



**Request for City Council Committee Action
From the City Attorney's Office and Minneapolis Police Department**

Date: September 17, 2003
To: Public Safety & Regulatory Services Committee
Referral to:

Subject: Nuisance Night Court Update

Recommendation: That the City Council receive and file this report and direct the City Attorney's Office and the Police Department as indicated.

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Approved by:

Jay M. Heffern
City Attorney

Robert K. Olson
Chief of Police

Presenters in Committee: Dana Banwer and Robert Allen

Financial Impact (Check those that apply)

- ☐ No financial impact - or - Action is within current department budget.
(If checked, go directly to Background/Supporting Information)
- ☐ Action requires an appropriation increase to the Capital Budget
- ☐ Action requires an appropriation increase to the Operating Budget
- ☐ Action provides increased revenue for appropriation increase
- ☐ Action requires use of contingency or reserves
- ☒ Other financial impact (Explain): Costs related to creation of alternative processes to handle livability offenses may include personnel costs, space costs, overtime costs, overhead, supplies, etc.
- ☐ Request provided to the Budget Office when provided to the Committee Coordinator

Community Impact:

Neighborhood Notification N/A

City Goals: Build communities where all people feel safe and trust the City's public safety professionals and systems; Promote public, community, and private partnerships to address disparities and to support strong, healthy families and communities.

Comprehensive Plan N/A

Zoning Code N/A

Other N/A

Background/Supporting Information See attached material.

REPORT TO PUBLIC SAFETY & REGULATORY SERVICES COMMITTEE ON NUISANCE NIGHT COURT PROPOSAL

September 17, 2003

Background

On April 9, 2003, this Committee directed the City Attorney's Office to "work with the Minneapolis Police Department, in consultation with the chief judge of Hennepin County District Court (and other court resources), and others to explore the possibility of creating a nuisance night court, and the feasibility of piloting this program during the summer of 2003." The City Attorney's Office was further directed to report back to this Committee on May 7, 2003.

On May 7, 2003, the City Attorney's Office presented a report to this Committee that outlined the court options available to the City to address livability offenses. Based on a "best practices" analysis of the Midtown Manhattan Community Court and the Philadelphia Nuisance Night Court, the report recommended further study of two main models: 1) Same Day/Night Court and/or 2) Next Day Court.

This Committee then directed staff to move "aggressively forward, with the City Attorney's Office being the coordinator of the project." The Committee action included a reporting schedule encompassing the next three meeting cycles as follows:

1. One cycle-May 21: The CCP/SAFE Team shall provide information through the City Attorney's Office for the Committee to decide on a geographic area to use for a pilot project.
2. Two cycles-June 11: Committee to receive a written update from the City Attorney's Office in terms of the stakeholders' involvement (i.e. the courts being a partner, possible location for the court, resource needs and demands on the various departments).
3. Three cycles-June 25: Staff to provide in person update looking at the specific things that would need to be done in order to implement the project this summer.

On May 21, 2003, the City Attorney's Office and CCP/SAFE presented a report, which outlined the type, incidence, and location of livability offenses occurring within the City in order to provide guidance to the Committee in selecting a geographic area to use for a pilot project. At a special meeting of the Public Safety & Regulatory Services Committee on June 2, 2003, the Committee "identified Downtown as the geographic area for a Pilot Project."

On June 11, 2003, the City Attorney's Office provided a written report to this Committee outlining stakeholders' involvement in the Nuisance Night Court proposal, including courtroom staffing and facilities/equipment needs.

On June 25, 2003, The City Attorney's Office provided a written report to this Committee summarizing the visit to observe Philadelphia's Nuisance Night Court and Summary Diversion Program, estimating staffing and cost requirements of night court/same day or next day court, and outlining next steps and recommendations. The City Attorney's Office was directed to develop "a general idea of the resources needed and the feasibility of initiating a program similar to Philadelphia's Summary Diversion Behavior Class, including a potential Restorative Justice component" and the use of the City's Administrative Adjudication Process on a dual track.

On July 16, 2003, the City Attorney's Office provided this committee with an oral report which briefly analyzed first precinct offenses and dispositions, and discussed of the feasibility of initiating a program similar to Philadelphia's Summary Diversion Behavior Class and possible class referral processes.

On August 13, 2003, the City Attorney's Office provided this committee with a written report that summarized the July 16, 2003 oral report and additionally discussed how several other communities have approached administrative enforcement systems. The City Attorney's Office and the Minneapolis Police Department were directed to develop specific recommendations regarding expanded use of the Administrative Enforcement and Hearing Process as well as a pre-charging diversion process and a post-charging diversion process through the Traffic Violations Bureau; including specific staffing and cost requirements for each process; to outline a proposed curriculum for a Livability Offenses Behavior Class; and to work with the City's IGR staff to pursue the legislative options discussed in the August 13, 2003 report.

Following is a discussion of the specific steps necessary to expand the use of the Administrative Enforcement and Hearing Process, to develop the Livability Offenses Behavior Class curriculum, implement a pre-charging diversion process and to modify the Traffic Violations Bureau process to allow post-charging diversion. This report also identifies important municipal and state legislative changes, as well changes to the Rules of Criminal Procedure necessary to implement the recommendations.

Update

1. Administrative Enforcement and Hearing Process

The City Attorney's Office and the Minneapolis Police Department jointly recommend that the City, use the Minneapolis Administrative Enforcement and Hearing Process,¹ to implement a Nuisance Night "Hearing" Program.² This pilot program would be limited to non-chronic offenders³ who

¹ This administrative hearing process is outlined in Minneapolis Code of Ordinances, Chapter 2.

² Unlike Pennsylvania, the rules of criminal procedure in Minnesota prohibit trials *in absentia* and petty misdemeanor certification without the defendant's consent. See Minn. R. Crim. P. 26.03; Minn. R. Crim. P. 23.04. See Also Attachment A "Memorandum - Minnesota Laws Prohibits Trials *In Absentia*." A Nuisance Night "Hearing" Process will more effectively address these legal limitations than a Nuisance Night Court, especially in light of existing interagency resistance to a Nuisance Night Court.

³ Chronic offenders are those persons who are on the Minneapolis Police Department and City Attorney's Office Top Offender lists. In those situations where a first precinct police officer would have ordinarily issued a criminal citation to one of these chronic offenders, the officers would instead advise the offender that the matter is going to be referred to the City Attorney's Office for possible charges. The First Precinct Community Attorney would then review chronic offender police reports, bench warrant histories, and conviction records to determine whether there is sufficient

commit one of the enumerated nuisance ordinance violations⁴ and would utilize a City Council approved civil fine schedule,⁵ existing restorative justice programs, Livability Offenses Behavior Classes, and Sentence to Service. See Attachment B ("Proposed Resolution and Fine Schedule"). Initially, hearings would be scheduled once a week from 4:00 p.m. to 8:00 p.m.⁶

Under the pilot program (the "Program"), when a police officer has a reasonable belief that a non-chronic offender has committed one of the enumerated nuisance ordinance violations, he or she will "personally serve" an administrative citation upon the offender.⁷ See Attachment C ("Sample Administrative Citation"). Administrative citations would only be issued under those circumstances in which an officer currently would not arrest and book the offender.⁸ The administrative citation will include the date, time, and the nature of the offense; the name of the official issuing the citation; the appropriate civil fine schedule; and will instruct the offender to contact the Program intake clerk to request a hearing or confirm the fine amount and arrange payment. The intake clerk would be housed in the Minneapolis City Attorney's Office. The following is a Matrix of proposed fines for the enumerated nuisance ordinance violations:

evidence to issue a complaint and whether the complaint should be issued by warrant or summons. At arraignment, assistant city attorneys would present the court with the offender's bench warrant and conviction record, as well as any available community impact statements. Based upon all the available and relevant information, the assistant city attorney would argue for appropriate sanctions, which may include mental and/or chemical health evaluations and treatment, geographical trespass, and/or incarceration.

⁴ On June 25, 2003, this committee identified the following offenses for this pilot project: disorderly conduct, trespassing, loitering, possession of drug paraphernalia, graffiti, littering, begging/panhandling, public urination, lurking, boom cars, minor consumption, possession of an open bottle, consuming in public, and liquor in the park. Minneapolis Code of Ordinances Section 2.60, however prohibits the application of the administrative enforcement and hearing process to ordinance violations which prohibit the same conduct as a crime or petty misdemeanor in Minnesota Statutes Chapter 609. As a result, to the extent that the Minneapolis trespass (Mpls. Ord. 385.325 and 385.80) and disorderly conduct (Mpls. Ord. 385.90) ordinances prohibit the same conduct as the trespass (Minn. Stat. 609.605) and disorderly conduct (Minn. Stat. 609.72) statutes, they cannot be handled through the administrative enforcement process. This conclusion is in accord with The League of Minnesota Cities' September 9, 2003 resolution that it:

... supports the use of city administrative fines for local regulatory ordinances such as building codes, zoning codes, health codes and public nuisance ordinances. The League also supports the use of city administrative fines, at a minimum, for matters that are not duplicative of misdemeanor or higher-level state traffic and criminal offenses. Further, the League of Minnesota Cities endorses the concept that administrative penalty hearings should be held before disinterested third parties, which may include city councils, to ensure fairness in the proceedings.

In addition, it is unclear if park board ordinances can be enforced under the administrative enforcement and hearing process. It should also be noted that the courts have distinguished civil/regulatory laws from criminal/prohibitory by determining whether "the prohibited activity is a small subset or facet of a larger, permitted activity. State Stone, 557 N.W.2d 588, 591 (Minn. Ct. App. 1997).

⁵ Minneapolis Code of Ordinance, Section 2.70 provides "The city council will adopt by resolution a schedule of civil fines for administrative offenses. City officials enforcing this chapter must adhere to this schedule of fines."

⁶ If the number of hearing requests is greater than expected, additional evening or daytime hearing sessions would be added.

⁷ See Minneapolis Code of Ordinances Sections 2.20(1) and 2.50.

⁸ In other words, if the offense is committed under circumstances in which an officer would currently arrest and book the offender, officers will continue to arrest and book the offender.

	First Administrative Citation	Second Administrative Citation	Third Administrative Citation	Fourth Administrative Citation
Begging Mpls Ord. 385.60	\$80	\$160	\$320	\$640
Consuming in Public Mpls. Ord. 364.40	\$80	\$160	\$320	\$640
Drug Paraphernalia in a Public Place (Proposed Mpls. Ord.)	\$240	\$480	\$960	\$1920
Graffiti Mpls Ord. 244.495	\$240	\$480	\$960	\$1920
Littering Mpls. Ord 427.30	\$80	\$160	\$320	\$640
Loitering Mpls. Ord 385.50	\$240	\$480	\$960	\$1,920
Loiter w/ Open Bottle Mpls. Ord. 364.45	\$80	\$160	\$320	\$640
Lurking Mpls. Ord. 385.80	\$240	\$480	\$960	\$1,920
Minor Consumption Mpls. Ord 370.40	\$160	\$320	\$640	\$1,280
Noise violations Mpls. Ord. 385.65	\$80	\$160	\$320	\$640
Public Urination (Proposed Mpls. Ord.)	\$80	\$160	\$320	\$640

Although it may be possible to preprint hearing dates on the administrative citations after enough citations have been processed to obtain a reliable estimate of the number of hearing requests, initially it makes sense to have the intake clerk schedule the hearings.⁹ When the offender contacts the intake clerk, the clerk will review the offender's administrative citation record, confirm the fine amount, and explain to the offender that he or she may:

1. request a hearing; or
2. pay the fine, or;
3. in lieu of the fine, successfully complete CCNP's restorative justice program; or
4. in lieu of the fine, successfully complete the Livability Offenses Behavior Class; or
5. in lieu of the fine, perform one day of Sentence to Service for every eighty dollars owed.

The restorative justice program and the one-day behavior class, however, would not be offered if the offender had previously failed to complete that particular program.

⁹ Based upon the First Precinct's 2001 and 2002 livability arrests, there could be as many as 10-15 administrative citations issued each day.

If the offender requests a hearing, the intake clerk will schedule an evening hearing at least ten days out.¹⁰ The Program Administrative Clerk will then make sure that the offender is properly served with the notice of the hearing. In addition, the Administrative Clerk will notify one of the three existing Hearing Officers, the relevant police officers, and ensure that the hearing room and equipment are properly prepared. These hearings will be held in existing space either in City Hall or at the first precinct. The Administrative clerk will be housed in the Minneapolis City Attorneys Office.

If the offender opts to pay the fine, the intake clerk will confirm with the offender the amount and manner in which it is to be paid. The Administrative Clerk will track payments in a computerized database.

Restorative Justice and Livability Offense Behavior Class

If the offender chooses the restorative justice program or the one-day Livability Offenses Behavior Class, the intake clerk will make the necessary referral to those programs. The Administrative Clerk will track the offender's participation in those programs in the computerized database.

The specific curriculum for the one-day Livability Offenses Behavior Class might include:

1. Setting Ground Rules
2. Self Assessment
 - Offender's Background/Family
 - Understanding Offender's Environment
 - Offender's Values/Trusts
3. Who's a Criminal?
4. Discussion of How Livability Crimes Impact the Community led by a CCNP Volunteer Community Member
5. Personal Responsibility
 - Why Did Offender Commit the Livability Offense?
 - Stress Management Skills
 - Effects of Alcohol and Drugs
 - What is Freedom?
6. Choices and Consequences
 - Distinguishing between Wants and Needs
 - Social Service/Community Resources
7. Steps to Self Image
 - Finding Life's Purpose

¹⁰ Minneapolis Code of Ordinances, Section 2.100 requires notice to of the hearing to be served on the offender at least ten days prior to the hearing.

8. Establishing Personal Goals/Next Steps

9. Share Lessons Learned

This sample curriculum is based upon materials received from the Conduct Modification Center, which currently runs the RECAP shoplifting-program. As mentioned in the August 13, 2003 report, the City may be able to reach an agreement with the Conduct Modification Center whereby the Center's fees, include the City's administrative costs (i.e. charge \$185.00 per class, and sends \$100 back to the City to cover the administrative costs of reviewing and referring cases).

Sentence to Service

If the offender selects Sentence to Service, the intake clerk would explain to the offender how many days of Sentence to Service were required to work off the scheduled fine at a rate of \$10 an hour. According to Bob Hunter, who is in charge of Hennepin County's Sentence to Service Program, offenders could perform Sentence to Service 8:00 a.m.-3:30 p.m. (Monday through Sunday) or 12:00 p.m. to 8:00 p.m. (Monday through Thursday). Mr. Hunter further explained that the offenders could be assigned to Downtown, as well as Jordan or Phillips neighborhood specific work crews that would expand the positive impact of the Program beyond the First Precinct. The Administrative Clerk will track the offender's performance of Sentence to Service in an excel spreadsheet or access database.

Failure to Pay Fine/Schedule Hearing

If the offender fails to pay the fine or request a hearing within 25 days of service of the administrative citation, the nonpayment of the civil fine constitutes a personal obligation which "may be collected by the city by any appropriate legal means."¹¹ The means most likely, would be a conciliation court action to obtain a civil judgment which the city, or a collection agency, would collect.¹² It should be noted that, pursuant to Minneapolis Code of Ordinances Section 2.20, the City could also opt to pursue criminal charges against offenders who fail to pay the fine, request a hearing, or successfully complete the diversion or Sentence to Service programs.

Cost Estimates and Implementation Schedule

The Program would be essentially a revenue neutral program. The estimated annual cost of the Program is \$94,604.¹³ The estimated annual program revenue would total \$91,200.¹⁴ This

¹¹ See Minneapolis Code of Ordinances Section 2.90

¹² This collection strategy should be effective as long as the offender receives proper service/notice (Fair Political Practices Commission v. Californians Against Corruption, 109 Cal. App. 4th 269, 134 Cal.Rptr.2d 659 (2003)), the hearings are held before a neutral hearing officer (Conlin v. City of St. Paul, 418 N.W.2d 741 (Minn. Ct. App. 1988)), and the fines are not deemed to be excessive (Wilson v. Comm'r of Revenue, 656 N.W.2d 547 (Minn. 2003)).

¹³

Intake Clerk	(new position)	(OSS1, step 3)	\$ 34,757
Administrative Clerk	(new position)	(OSS2, step 3)	\$ 46,088
Hearing Officer		(\$100 a session, 52 weekly sessions a year)	\$ 5,200
Evening Security (City Hall)		(\$100 a session, 52 weekly sessions a year)	\$ 5,200
Sentence to Service Contract		(\$2.50 an hour for each offender)	\$ 1,300
Telephone costs			\$ 949
Computer costs			\$ 1,110

estimate is based on the following assumptions: (1) currently 50% of the people who receive citations in Minneapolis fail to respond; (2) there were 3,800 livability citations in 2003; (3) the average initial fine is \$120; and (4) the city could collect about 40 cents on the dollar from persons who fail to respond to the citations. The Program could be implemented on the following floating schedule:

a. Within 30 days after City Council Approval

- Hire permit Intake Clerk
- Hire permit Administrative Clerk
- Begin process to hire permanent Intake and Administrative Clerks
- Set up necessary telephone and computer equipment
- Develop and Print Administrative Citation Forms
- Contract with Conduct Modification Center to develop and run Livability Offense Behavior Class

b. Within 45 days after City Council Approval

- Distribute Administrative Citation Forms
- Train Police Officers on Administrative Citation Process
- Begin Running the Livability Offenses Behavior Class

c. Within 90 days after City Council Approval

- Hold first Administrative Hearing
- Issue quarterly report to Public Safety & Regulatory Services Committee regarding program status.

d. Within 180 days after City Council Approval

- Hire permanent Intake Clerk
- Hire permanent Administrative Clerk
- Issue quarterly report to Public Safety & Regulatory Services Committee regarding program status.

e. Within 270 days after City Council Approval

- Issue quarterly report to Public Safety & Regulatory Services Committee regarding program status.

f. Within 360 days after City Council Approval

Total

\$ 94,604

¹⁴

1,900 (unanswered citations) x \$120 (average initial fine) x .40 (collection rate) = \$91,200

- Issue quarterly report to Public Safety & Regulatory Services Committee regarding program status.

g. Within 395 days after City Council Approval

- Report to Public Safety & Regulatory Services Committee evaluating first twelve months of pilot program.

One of the advantages of the Program is that, unlike the current system, it provides offenders an incentive to respond to their citations - specifically failure to do so will result in a civil judgment and/or criminal complaint, which may be issued as a warrant depending on the offender's nonappearance history. In addition, its progressive fine schedule ensures greater accountability and will likely provide more meaningful interventions through increased participation in the restorative justice, behavior modification, and Sentence to Service projects.

2. Pre-charging Diversion Program

The advantage of a pre-charging diversion program is that it could be implemented quickly and at little, or no expense, using currently budgeted resources.

Under a pre-charging diversion pilot program, when a police officer observed an offender commit one of the enumerated nuisance ordinance violations, under circumstances in which he or she would not currently arrest and book the offender, the officer would simply inform the offender that the officer was going to forward his or her report to the Minneapolis City Attorney's Office for possible charges. The officer would then provide the First Precinct Community Paralegal with the police report numbers for those incidents. This paralegal position would be provided by the City Attorney's Office through a currently budgeted existing position, and would have a cubicle and computer at the First Precinct.

The First Precinct Community Paralegal would review the officer's reports and the offender arrest, bench warrant, and conviction records. Based upon that review, this paralegal would send a letter to non-chronic offenders explaining that if they successfully complete CCNP's restorative justice program, the Behavior Modification Class, and/or the Sentence to Service program, the City would not charge their case. The letter would direct the offender to contact the paralegal to set up the proper referral. The paralegal would then track the offender's program participation. If the offender successfully completed the program, no charges would be filed. If the offender failed to respond to the letter or fails to successfully complete the program, the offender's case would be referred to the First Precinct Community Attorney for issuance of a formal complaint. It should be noted that any chronic offenders would be referred directly and immediately to the First Precinct Community Attorney for issuance of a formal complaint by summons or warrant, as chronic offenders would be ineligible to participate in a pre-charging diversion program.

Hennepin County recently provided the City Attorney's Office with a report regarding misdemeanor cases, however, it did not include the information requested. See Attachment D ("all non-felony cases filed in Hennepin County in 2000, 2001, and 2002"). Based upon the First Precinct's 2001 and 2002 livability arrests, there would be an average of about 10-15 cases a day, with a significantly larger number on Monday mornings.

Estimated Costs and Implementation Schedule

The estimated annual cost of a pre-charging diversion pilot program is \$59,194.¹⁵ This program would be a revenue neutral program. The estimated annual program revenue would total \$57,000.¹⁶ This estimate is based on the following assumptions: (1) currently 30% of the people referred to the RECAP program pay the program fee and successfully complete the program; (2) the appearance rate for the Livability Offense Behavior Modification Class would be similar to RECAP; (3) the City would collect \$100 from each person referred to the Livability Offense Behavior Modification Class; (3) approximately half of the 3,800 livability offenders would be eligible for the Livability Offense Behavior Modification Class. The program could be implemented on the following floating schedule:

- a. Within 30 days after City Council Approval
 - Hire permit First Precinct Community Paralegal
 - Begin process to hire permanent Intake and Administrative Clerks
 - Set up necessary computer equipment
 - Train Police officers
 - Contract with Conduct Modification Center to develop and run Livability Offense Behavior Class
 - Begin screening and referring cases
- b. Within 45 days after City Council Approval
 - Begin Running the Livability Offenses Behavior Class
- c. Within 90 days after City Council Approval
- d.
 - Issue quarterly report to Public Safety & Regulatory Services Committee regarding program status.
- d. Within 180 days after City Council Approval
 - Hire permanent First Precinct Community Paralegal
 - Issue quarterly report to Public Safety & Regulatory Services Committee regarding program status.
- e. Within 270 days after City Council Approval

¹⁵	Paralegal (currently budgeted existing position)	\$ 56,784
	Sentence to Service Contract	\$ 1,300
	Computer costs	<u>\$ 1,110</u>
	Total	\$ 59,194

¹⁶ 1,900 (eligible offenders) x \$100 (class fee) x .30 (attendance rate) = \$57,000

- Issue quarterly report to Public Safety & Regulatory Services Committee regarding program status.
- f. Within 360 days after City Council Approval
- Issue quarterly report to Public Safety & Regulatory Services Committee regarding program status.
- g. Within 395 days after City Council Approval
- Issue quarterly report to Public Safety & Regulatory Services Committee regarding program status.

A pre-charging diversion pilot program would provide a quick and inexpensive way to provide more timely diversion of offenders who currently appear in court and receive diversionary dispositions. In addition, it would reduce arraignment calendars, which would provide arraignment prosecutors more time to focus on chronic offenders.

Traffic Violations Bureau Post-Charging Diversion

A Traffic Violations Bureau, Post-Charging Diversion pilot program could be set up two different ways.

Offenses Remain Misdemeanors

The City Attorney's Office could remove any mandatory court requirements from the enumerated nuisance ordinance violations and direct the Traffic Violation Bureau to attempt to resolve these cases by offering the same alternatives that the intake clerk would offer under the Program. Specifically, the Traffic Violations Bureau could be authorized to offer payment of a fine, or in lieu of the fine CCNP's restorative justice program, the one-day Livability Offenses Behavior Class, or Sentence to Service. If the offender rejected these offers, his or her case would be sent to district court. This approach, however, does not address the non-appearance issue. Offenders who failed to respond to the citations would continue to be referred to the Minneapolis City Attorney's Office as "unanswered tags."

Offenses Are Amended to Petty Misdemeanors

The City Council could amend the enumerated nuisance ordinances to petty misdemeanors. Traffic Violations Bureau could still offer payment of a fine, or in lieu of the fine, CCNP's restorative justice program, the one-day Livability Offenses Behavior Class, or Sentence to Service. Because the maximum fine for a petty misdemeanor is \$300, it unclear how many offenders would choose to go to a diversion program. If the offender rejected these offers, his or her case would be sent to district court. This second approach, however, may potentially address the issue of offenders who fail to appear or respond to the citations. The Traffic Violations Bureau currently sends unanswered petty misdemeanor citations to a State collection agency based upon language of Minn. Stat. Sec. 609.491, Subd. 1, which states:

If a person fails to appear in court on a charge that is a petty misdemeanor, the failure to appear is considered a plea of guilty and waiver of the right to trial, unless the person appears in court within ten days and shows that the person's failure to appear was due to circumstances beyond the person's control.

In the future a reviewing court, however, might find that Minn. Stat. 609.471 is unconstitutional because it conflicts with Minn. R. Crim. P. 26.03, which is applied to petty misdemeanors by Minn. R. Crim. P. 23.05. See State v. Haney, 600 N.W.2d 469, 471 (Minn. Ct. App. 1999); State v. Cassidy, 567 N.W.2d 707, (Minn. 1997)(Rule 26.03 creates a right even greater than the federal constitutional right to be present at trial); Crosby v. United States, 506 U.S. 255, 262, 113 S.Ct. 748, 753 (1993)(failure to appear does not constitute a valid waiver of the Fed. R. Crim P., Rule 43 right to be present at trial); See Attachment A (Memorandum - Minnesota Law Prohibits Trials In Absentia).

The Traffic Violations Bureau Supervisor Kathy Lura estimates that the cost of either approach would be \$2,160 a year (one week of data entry by three people at \$18 an hour to add the 3,800 livability offenses). Either approach could be implemented 30 days after City Council approval.

3. Proposed Statute, Ordinance and Rule Changes

The City Attorney's Office has forwarded the legislative changes discussed in the August 13, 2003 report to the City's IGR staff. See Attachment E ("Legislative Changes"). In addition to the attached state legislative changes, the City Attorney's office recommends the City Council enact several new ordinances, as well as direct the City's IGR staff and the City Attorney's Office to forward several rule changes to the appropriate Supreme Court advisory committee for its consideration.

a. Proposed Ordinances to Enhance Prosecution of Nuisance Ordinance Violations

Public Urination

There currently is not a "public urination" ordinance. This offense is currently cited as either disorderly conduct or indecent exposure. This approach however dilutes both of those more serious offenses because it is difficult to tell whether a prior conviction was for public urination or for a bar fight or indecent exposure (i.e. flashing). The City Attorney's Office recommends that the City Council enact a new ordinance as follows:

Any person who urinates or defecates on any public street, alley, sidewalk or floor of any public building or of any building where the public gathers or has access, or in any other place, whether public or private, where such act could be observed by any member of the public, except in such place that has been designated as a restroom is guilty of a misdemeanor.

See Attachment F ("Public Urination Ordinance - Introductory Language")

Possession of Drug Paraphernalia in a Public Place¹⁷

¹⁷ Minn. Stat.152.205 expressly grants authority to pass municipal ordinances regarding drug paraphernalia. It reads:152.205. Local regulations

General possession of drug paraphernalia is a petty misdemeanor. Its possession or use in a public place is injurious to the public welfare and warrants more significant penalties. The City Attorney's Office recommends that the City Council enact a new ordinance as follows:

Possession of drug paraphernalia in a public place prohibited. It is unlawful for any person knowingly or intentionally to use or to possess drug paraphernalia in a public place. As used in this section, "public place" shall include streets, alleys and sidewalks dedicated to public use, and shall also include such parts of buildings and other premises whether publicly or privately owned which are used by the general public or to which the general public is invited commercially, for a fee, or otherwise, or in or on which the general public is permitted without specific invitation. Any violation of this section is a misdemeanor.

See Attachment G (Possession of Drug Paraphernalia in a Public Place Ordinance - Introductory Language")

b. Proposed Amendments to Minnesota Rules of Criminal Procedure¹⁸

Rule 23.04

Currently, a misdemeanor offense may not be certified as a petty misdemeanor without the defendant's consent. Minnesota Rules of Criminal Procedure, Rule 23.04 currently provide as follows:

If at or before the time of arraignment or trial on an alleged misdemeanor violation, the prosecuting attorney certifies to the court that in the prosecuting attorney's opinion it is in the interests of justice that the defendant not be incarcerated if convicted, the alleged offense shall be treated as a petty misdemeanor if the defendant consents and the court approves.

Minn. R. Crim. P. 23.04. This requirement is an impediment to a post-charging diversion process similar to Philadelphia's because both the defendant and the court must agree to a prosecutor's attempt to certify a misdemeanor as a petty misdemeanor. By necessity, this requires at least an initial court appearance. Amending this Rule to allow the prosecutor to certify misdemeanor

Sections 152.01, subdivision 18, and 152.092 to 152.095 do not preempt enforcement or preclude adoption of municipal or county ordinances prohibiting or otherwise regulating the manufacture, delivery, possession, or advertisement of drug paraphernalia.

As long as the state has not expressly precluded local regulation, there is no conflict when the state regulates a topic and the local government adds additional regulations that provide consequences greater than those already provided. See *City of Duluth v. Evans*, 158 Minn. 450, 452 197 N.W. 737, 737 (1924)(cited in *Hannan v. City of Minneapolis*, 623 N.W.2d 281 (Minn. Ct. App. 2001)(upholding a city ordinance with more severe provisions than the state statute).

¹⁸ Under Minn. Stat. Section 480.059, Subd. 1 (2002), the Minnesota Supreme Court has the power to regulate the pleadings, practice, procedure and forms thereof in criminal actions in all courts of this state by rules promulgated by it from time to time. Before any such rules are adopted, the Supreme Court shall appoint an advisory committee consisting of eight lawyers licensed to practice law in the state, one judge of the Court of Appeals, and two judges of the district court to assist the Court in considering and preparing such rules. Minn. Stat. §480.059, Subd. 2 (2002).

offenses to petty misdemeanors without consent of the defendant or the court, and without a court appearance, would give prosecutors the ability to offer a diversion program at the post-charging stage as well as the pre-charging stage. The City Attorney's Office, therefore, proposes that this language be amended as follows:

If at or before the time of arraignment or trial on an alleged misdemeanor violation, the prosecuting attorney certifies to the court that in the prosecuting attorney's opinion it is in the interests of justice that the defendant not be incarcerated if convicted, the alleged offense shall be treated as a petty misdemeanor. ~~if the defendant's consents and the court approves.~~

Rule 26.03

As discussed above Minnesota Rules Criminal Procedure, Rule 26.03, subd. 2 currently limits the manner in which a defendant may waive his right to be present at trial. It reads:

(2) *Continued Presence Not Required.* The further progress of a trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to waive the right to be present whenever:

1. a defendant voluntarily and without justification absents himself or herself after trial has commenced; or
2. a defendant after warning engages in conduct which is such as to justify being excluded from the courtroom because it tends to interrupt the orderly procedure of the court and the due course of the trial. As an alternative to exclusion, the court may use all such methods of restraint as will ensure the orderly procedure of the court and the due course of the trial.

The United States Supreme Court has ruled that the waiver set forth in Federal Rules Criminal Procedure, Rule 43, which nearly mirrors our Rule 26.03, are the only ways a defendant may waive his right to be present at trial. This creates a potential conflict with Minn. Stat. Sec. 609.471 that states that a defendant's failure to appear on a petty misdemeanor constitutes a waiver of trial. The City Attorney's Office, therefore, proposes that this language be amended as follows:

(2) *Continued Presence Not Required.* The further progress of a trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to waive the right to be present whenever:

1. a defendant voluntarily and without justification absents himself or herself after trial has commenced; or
2. a defendant after warning engages in conduct which is such as to justify being excluded from the courtroom because it tends to interrupt the orderly procedure of the court and the due course of the trial. As an alternative to exclusion, the court may use all such methods of restraint as will ensure the orderly procedure of the court and the due course of the trial.
3. A defendant fails to appear in court on a charge that is a petty misdemeanor, unless the defendant appears in court within ten days and shows that the defendant's failure to appear was due to circumstances beyond the defendant's control.

Next Steps and Recommendations

Based on the above, we recommend that the City Council:

- 1) Receive and file this report;
- 2) Direct the Minneapolis City Attorney's Office and Minneapolis Police Department to implement the proposed Program outlined above within 30 days after City Council approval;
- 3) Authorize the establishment of an OSS1 (Intake Clerk) and an OSS2 (Administrative Clerk) positions in the City Attorney's Office;
- 4) Direct the Minneapolis City Finance Department to dedicate an account for the Program revenue;
- 5) Authorize the City Financial Officer to appropriate all Program revenues to the City Attorney's Office to pay for the Program costs.
- 6) Direct the Minneapolis City Attorney's Office to contract with the Conduct Modification Center to modify existing materials to create and implement a Livability Offenses Behavior Class within 45 days after City Council approval;
- 7) Authorize proper City Officials to contract with the Conduct Modification Center to develop and implement the Livability Offenses Behavior Class;
- 8) Direct the Minneapolis City Finance Department to dedicate an account for Livability Offense Behavior Class revenue;
- 9) Authorize the City Financial Officer to appropriate all Livability Offense Behavior Class revenues to the City Attorney's Office to pay for program costs; and
- 10) Introduce the subject matter of amending the ordinances outlined above and refer subject matter to appropriate committee.